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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/067,989	02/08/2002	Randy Dinkins	028750-219	9928
7590	10/07/2005		EXAMINER	KUBELIK, ANNE R
Teresa Stanek Rea BURNS, DOANE, SWECKER & MATHIS, L.L.P. P.O. Box 1404 Alexandria, VA 22313-1404			ART UNIT	PAPER NUMBER
			1638	

DATE MAILED: 10/07/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action  
Before the Filing of an Appeal Brief**

**Application No.**

10/067,989

**Applicant(s)**

DINKINS ET AL.

**Examiner**

Anne R. Kubelik

**Art Unit**

1638

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 01 September 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1.  The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

a)  The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
 b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2.  The Notice of Appeal was filed on 9/1/05. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3.  The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
 (a)  They raise new issues that would require further consideration and/or search (see NOTE below);  
 (b)  They raise the issue of new matter (see NOTE below);  
 (c)  They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d)  They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4.  The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
 5.  Applicant's reply has overcome the following rejection(s): See Continuation Sheet.  
 6.  Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7.  For purposes of appeal, the proposed amendment(s): a)  will not be entered, or b)  will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_

Claim(s) objected to: \_\_\_\_\_

Claim(s) rejected: 1-7,10-14,28-31 and 34.

Claim(s) withdrawn from consideration: 8,9,15-27,32 and 33.

AFFIDAVIT OR OTHER EVIDENCE

8.  The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
 9.  The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
 10.  The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11.  The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.  
 12.  Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). \_\_\_\_\_  
 13.  Other: \_\_\_\_\_

Continuation of 5. Applicant's reply has overcome the following rejection(s):

112, 1st, written description (new matter);

102(a) over Huang et al.

Continuation of 11. does NOT place the application in condition for allowance because:

112, 1<sup>st</sup>, enablement: Applicant urges that because the claims recite a specified homology range, the claimed genes can be identified without undue experimentation. This is not found persuasive because the specification does not teach how to make or where to find the claimed nucleic acids. Thus, undue experimentation would be required to make or find them.

112, 1<sup>st</sup>, written description: Applicant urges that because the claims recite a specified homology range, the claimed genes can be identified without undue experimentation. This is not found persuasive. Applicant's arguments are drawn to enablement, not written description. The specification does not describe the necessary and sufficient structural elements of protein encoded by the Arabidopsis MinD gene.

112, 2<sup>nd</sup>: Applicant urges that the amendment to specify the homology range make clear which proteins are being referred to. This is not found persuasive because the claims still refer to the protein encoded by the MinD gene, and any DNA can encode many proteins. It is suggested that a SEQ ID NO: for the protein be recited in the claim. The other 112, 2nd rejections are obviated by Applicant's amendment of the claims.

102(a) over Colletti et al: Applicant urges that Colletti put the vector in Arabidopsis, where the Arabidopsis MinD gene would be endogenous, while the Applicants put it in tobacco, where it would be exogenous; this is an important structural difference. This is not found persuasive. Intended use does not change the structure of a composition; the structure is the same in both cases. The vector taught by Colletti et al is a species of the vectors comprising nucleic acid encoding proteins with 95% identity to the protein encoded by the Arabidopsis MinD gene claimed in the instant application. The rejection stands over claims 1-7, 10-13 and 34.

102(a) over Kanamaru et al. Applicant urges that Kanamaru put the vector in Arabidopsis, where the Arabidopsis MinD gene would be endogenous, while the Applicants put it in tobacco, where it would be exogenous; this is an important structural difference. This is not found persuasive. Intended use does not change the structure of a composition; the structure is the same in both cases. The vector taught by Colletti et al is a species of the vectors comprising nucleic acid encoding proteins with 95% identity to the protein encoded by the Arabidopsis MinD gene claimed in the instant application. The rejection stands over claims 1-7, 10-13 and 34.



ANNE KIBELIK, PH.D.  
PRIMARY EXAMINER